TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

THE UNITED STATES OF AMERICA, EX REL. MAY JOHNSON, PETITIONER,

vs.

W. FRANK WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE IN THE NEW YORK DISTRICT, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 12, 1949.

CERTIORARI GRANTED MARCH 7, 1949.

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United States Circuit Court of Appeals

For the Second Circuit

1

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,

Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent-Appellee. 2

Statement Under Rule 15

This is an appeal from an order of the Honorable Simon H. Rifkind, United States District Judge, entered on July 6, 1948, in the office of the Clerk of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus, issued April 21, 1948.

No hearing was held on said writ. This appeal from the aforesaid order was taken on July 23, 1948. 3

The original attorney of relator was Mr. Haskell R. Barst. Gunther Jacobson, Esq., of 36 West 44th Street, New York City, was substituted as attorney prior to re-argument had before Judge Rifkind. There was no other change of parties or attorneys.

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To: W. F. WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the said MAY JOHNSON in custody:

WE COMMAND YOU, that you have the body of MAY JOHNSON, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before one of the Judges of the United States District Court in and for the Southern District of New York, on the 27 day of April, 1948, at 10:30 o'clock in the forenoon of that day, in the United States Courthouse, Room 506, located on Foley Square, in the Borough of Manhattan, City and State of New York, to do and receive all and singular those things which the said Judge shall then and there consider of you in this behalf and have you then and there this writ.

WITNESS: Hon. JOHN C. KNOX, Judge of the United States District Court for the Southern District of New York, at New York, N. Y., in said district this 21 day of April, 1948.

WILLIAM V. CONNELL,
Clerk.

WRIT ALLOWED 4/21/48.

HENRY W. GODDARD,
U. S. D. J.

Petition for Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the Honorable Judge of the District Court of the United States for the Southern District of New York:

The petition of Inga Obum shows that she is a legal permanent resident of the United States and resides at No. 145 West 73rd Street, in the Borough of Manhattan, City and State of New York, and that she is a friend of May Johnson and is duly authorized by said May Johnson to make this application.

That the said May Johnson is now imprisoned and detained by the Immigration and Naturalization Service at Ellis Island, New York Harbor, and restrained in her liberty, and the Immigration and Naturalization Service has scheduled her deportation from the United States to Sweden on the SS. Gripsholm on April 23rd, 1948.

That upon information and belief, the said May Johnson is not imprisoned, committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof, nor is she imprisoned, committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish her for contempt; nor by virtue of an execution or other process issued by such judgment, decree or final order.

That the said May Johnson has been in detention at Ellis Island since March 1st, 1948, but has been the sub-

10 *Petition for Writ of Habeas Corpus*

ject of proceeding which terminated by an order of the Board of Special Inquiry dated April 6th, 1948, and the refusal of the General Office of the Immigration and Naturalization Service to review such order on April 19th, 1948. There was, therefore, no earlier opportunity to apply for this writ of habeas corpus.

That the cause or pretense of the imprisonment or restraint and the threatened impending deportation, according to the best knowledge and belief of your petitioner, is that the Immigration and Naturalization Service contends
11 that May Johnson is mandatorily excludable from the United States by reason of an order of the Board of Special Inquiry at New York which is, in effect, a final order from which there is no appeal allowed in accordance with the regulations of the Immigration and Naturalization Service. My attorney has examined the files of the Immigration Service and has informed me of its contents.

The facts and circumstances in this matter, to the best knowledge of your petitioner, are as follows: May Johnson is an unmarried young woman in her early thirties. Prior to her departure from Sweden in February of this year, she had a responsible position in the Swedish film in-
12 dustry. She had never been confined to any institution for any mental disorder. She secured a quota immigration visa at the American Consulate in Stockhold and, I am told, that she was given a physical examination at that time. She arrived in New York on March 1st, 1948, ex SS Stockhold of the Swedish American Line and was taken into custody for examination by the Public Health Service at Ellis Island. It appears that while enroute to the United States on the SS Stockhold she became ill and was treated by the Ship's doctor, one Dr. Gunnar Malmsten. A report was filed with the Immigration Service by Dr. Malmsten upon the arrival of the SS Stockhold as a result of

which she was held for examination by the Public Health Service.

Information furnished by Miss May Johnson indicates that her illness aboard ship was in the nature of physical exhaustion brought about by the excitement of her departure from Sweden for the United States. Also, from the information furnished to me, it may be that the ship's doctor misconstrued the nature of an illness from which the alien suffered several years ago while in Sweden. Since the ship's doctor filed his report, I have personally spoken with him and he has volunteered the opinion that the alien is not suffering from any mental disorder.

The fact is, however, that physicians of the Public Health Service examined the alien and issued what is known as a "Class A Medical Certificate" on the grounds that the alien is a mental defective. I understand that the issuance of such certificate results in mandatory exclusion from the United States. It is of interest to note that, in behalf of the alien, I retained Dr. Carleton Simon, a prominent psychiatrist and neurologist of New York City, to examine the alien and render his report to the Public Health Service. Dr. Simon made such examination and rendered a report in which he stated, in substance, but quite emphatically that the alien is not psychotic and is not mentally defective.

The Public Health Service has ignored the report of Dr. Simon and has adhered to its original report stating that the alien is a mental defective.

I am informed that a request has been made to the Central Office of the Immigration Service for a review of the order of the Board of Special Inquiry but that such request has been refused.

I believe that the findings of the Public Health Service have been based upon a misunderstanding of the report of

the ship's doctor who now states that in his opinion the alien is not mentally defective and more particularly upon the fact that the alien who speaks little English did not understand the questions put to her by the Public Health physicians and the latter probably obtained the wrong impression. I am told that the "Class A Medical Certificate" is for the most part based upon the oral examination of the alien rather than upon any affirmative medical findings.

The said May Johnson contends that she is not mentally defective and that she is not, therefore, subject to ex-
17 clusion and deportation and that the Immigration and Naturalization Service has no legal justification to effect her deportation from the United States, or to hold her in custody and restrain her in her liberty. Your petitioner believes that the said May Johnson was imprisoned, committed or detained, as herein stated, without reason or justice and without her consent and against her wishes and protest.

No previous application for the relief herein sought has been made.

WHEREFORE, your petitioner prays that a Writ of Ha-
18 beas Corpus issue directed to W. F. Watkins, District Director of the United States Immigration and Naturalization Service at New York, 70 Columbus Avenue, in the Borough of Manhattan, City and State of New York, commanding him to produce the said May Johnson before a Justice of this Court.

Dated, New York, N. Y.
April 21st, 1948.

INGA OBUM,
Petitioner.

(Verified by Inga Obum, petitioner, on April 21st, 1948.)

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Return to Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 45-577

[SAME TITLE]

SOUTHERN DISTRICT OF NEW YORK, ss.:

20

LESTER FRIEDMAN, being duly sworn, says that he is and during all the times herein mentioned has been an attorney in the service of the United States Department of Justice, Immigration and Naturalization Service, attached to the office of the District Counsel, New York District; that in his official capacity he is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

21

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(a) The petition does not allege facts to show that the proceedings of the Department of Justice upon which was issued the order of exclusion pursuant to which the said alien was held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute;

22 *Return to Writ of Habeas Corpus*

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Justice upon which the order of exclusion was issued;

(c) It is not alleged that there was no evidence before the Department of Justice upon which it based or could have based its findings and conclusion in accordance with which the order of exclusion was issued;

(d) It does not appear by allegation of facts that the
23 issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Justice adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Justice of the United States with respect to the above-named alien, which records are incorporated herein by reference.

1. Relator, May Gunborg Johnson, is a 33 year old female native and citizen of Sweden who last arrived at the Port of New York on the S.S. "Stockholm" on March 1, 1948 for permanent residence.

24 2. On March 16, 1948, and on April 6, 1948, relator was accorded a hearing before a Board of Special Inquiry, Immigration and Naturalization Service, at the conclusion of which she was excluded from admission to the United States in that she had been certified by surgeons of the United States Public Health Service to be mentally defective, Class A. A photostatic copy of the hearing is attached hereto and made a part hereof.

Return to Writ of Habeas Corpus

3. Upon appeal to a Board of Medical Officers, United States Public Health Service, the original certification was affirmed.

4. Relator is presently detained at Ellis Island, New York Harbor, New York, by the Immigration and Naturalization Service under the above-mentioned order of exclusion.

WHEREFORE, it is prayed that the writ of habeas corpus be dismissed and the alien be remanded to the custody of the Immigration and Naturalization Service.

Dated: New York, N. Y., May 28, 1948.

LESTER FRIEDMAN.

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Minutes of Hearing of Board of Special Inquiry March 16, 1948

BEFORE A BOARD OF SPECIAL INQUIRY

HELD AT

70 Columbus Ave., New York, N. Y.

Present:

INSP. EDW. A. CLARK, Chmn.
INS. RUSSELL DANIELSON
SECY. A. P. FAIRBANKS
29 Swedish Interpreter K. R. Helander

JOHNSON, May Gunborg
33 F Swedish Scand.

0300/221545

Arr NY S Stockholm, Swedish-American Line, March 1 ,1948

Sec 3 Act of 1917; Dlvd EI 3/1/48 1 P.M., EI Hosp. 3/1/48 2 PM; From Hosp. 3/12/48 2 PM

30

Made SI from TD 3/12/48 5 PM C. R. Challandes

Chairman to applicant who testified through interpreter in Swedish?

Q. What is your name? A. May Gunborg Johnson.

Q. You are informed that you have been referred to this board of special inquiry to be heard on your application for admission to the United tates, the burden of proof being upon you to establish that you are not inadmissible under any provision of the Immigration laws. Do you understand? A. Yes.

Q. You may have present at this proceeding counsel of your own selection at your own expense which counsel may be an attorney at law or other person authorized to practice before this service. You may also have present a friend or relative provided if that friend or relative is to appear as a witness your testimony must first have been completed. Do you wish to have counsel present? A. No.

Q. Do you wish to have a friend or relative present? A. No.

Q. Please rise and raise your right hand to be sworn. (complies) Do you solemnly swear that the testimony you will give this board will be the truth, the whole truth and nothing but the truth, so help you God? A. Yes.

Q. You are warned if you give false testimony at this proceeding you may be prosecuted for perjury and upon conviction be liable to a penalty of five years in a penitentiary and a fine of $2,000. Do you understand? A. Yes.

Q. You have stated your name to be May Gunborg Johnson, is that your full true and correct name? A. Yes.

Q. Is that the name given to you at birth? A. Yes.

Q. Have you ever used or been known by any other name? A. No.

Q. How old are you? A. 33 years.

Q. Of what country are you a citizen or subject? A. Sweden.

Q. Of what race of people are you? A. Scandinavian.

Q. When and where were you born? A. I was born in Falkenberg, Sweden, May 27, 1914.

Q. What is your marital status? A. Single.

Q. Are you traveling alone? A. Yes.

Q. Did you last arrive in the United States at the port of New York on the SS Stockholm on March 1, 1948 embarking at Goteborg on February 21, 1948? A. Yes.

34 *Minutes of Hearing of Board of Special Inquiry*
March 16, 1948

Q. What was your last residence abroad? A. St. Eric Street, Stockholm, Sweden.

Q. Who is your closest relative abroad? A. My mother Clara Johnson and my father Axel Johnson.

Q. Do you read? A. Yes.

Q. What is your occupation? A. I worked for moving picture concern in Stockholm as a film salesman.

Q. Have you ever been previously in the United States? A. No.

35 Q. Who paid your passage? A. I did.

Q. What is your destination? A. I am going to Paul Corbett, Brinker Road, Barrington, Illinois, to work in his home.

Q. What funds do you have? A. I have a check for $100 and $35 in currency at the Treasurer's Office at Ellis Island.

Q. Do you have a ticket or transportation anywhere? A. No.

Q. What is your purpose in coming to the United States and how long will you remain? A. To remain permanently.

36 Chairman: For the applicant there is presented Swedish Passport #L0422 issued on October 5, 1945 at Stockholm and valid to October 5, 1950. There is also presented immigration Visa and Alien Registration, Immigration Visa #1655 issued by the American Foreign Service at Stockholm on February 4, 1948 in the name of the applicant as a Swedish non-preference immigrant. Visa expires four months from the date of issue. Bears the signature of Carl Birkeland, Counsel.

Q. Have you ever been debarred or deported from the United States? A. No.

Q. Have you ever been arrested in any country? A. No.

Q. Are you in good health? A. Yes.

Chairman to board members: There has been issued Medical Certificate #380, Ellis Island, March 11, 1948; in the name of May G. Johnson who arrived on the S.S. Stockholm on March 1, 1948, certifying that she
Exhibit #1 has been examined and found to be afflicted with mental defective, Class A. Said certificate bears the signature of C. W. Mangun, Surgeon and B. Pasquarelli, Surgeon. Such certificate will be attached to the record of hearing and identified as EXHIBIT #1.

There is also attached to the file medical chart relating to the applicant and dated on the face February 1948 and indicating that the applicant occupied Stateroom #82 on the SS Stockholm and bearing the
Exhibit #2 notation at the top "Insania". The reverse side thereof bears typewritten report in Swedish relating to three days February 23, 24 and 29, 1948; there appears a hand written notation at the top of such report as follows: "Special Attention U.S.P.H.S. Ellis Island Hospital." Such report and a translation thereof will be attached to the record of hearing and identified as EXHIBIT #2.

Chairman to applicant:

Q. Have you any comment to make on either the Medical Certificate or the report which I show you? A. I would like

to call attention to what the medical report says on February 24th that I had stated that I had been treated at home for insanity or mental illness. That I deny. I have never been treated for insanity. And also as regards giving false information to the consul, I have no recollection of saying anything of that kind. When I went to the consul the only thing he asked me was to swear to the correctness of the answers given in the visa application and there was no information given by me other than swearing to the truth of those answers.

Q. You are advised that the certification entered in your case renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf. Do you wish to appeal to such a board? A. Yes I wish to appeal.

Chairman to board members: Motion to defer for appeal to a medical board is in order.

By Inspector Danielson: I move to defer for appeal to a medical board.

By Secretary Fairbanks: I second the motion.

Chairman: Unanimous.

I certify the foregoing consisting of four pages to be a true and correct transcription of the stenographic notes recorded by me.

A. P. FAIRBANKS,
A. P. Fairbanks, Secy.

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Minutes of Hearing of Board of Special Inquiry
April 6, 1948

BEFORE A BOARD OF SPECIAL INQUIRY

Held at 70 Columbus Ave., New York, N. Y.

JOHNSON, May Gunborg
33 F Swedish Scandinavian

44

April 6 1948 3:45 P. M.

Present:

INSP. EDW. A. CLARK, Chmn.,
INSP. H. A. MINTZER,
SECY. A. P. FAIRBANKS.
Swedish Interpreter K. R. HELANDER.

Counsel: HASKELL R. BARST
60 Broad Street
New York 4, N. Y.

45

0300/221545

Arr SS Stockholm, Swedish American Line, March 1 1948

DEFERRED APF-152 March 16 1948; Minutes of previous hearing made a part of this record.

By Inspector Mintzer: I have familiarized myself with the record in this case.

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April 6, 1948

Chairman to applicant who testified through interpreter in Swedish:

Q. What is your name? A. May Gunborg Johnson.

Q. Were you before a board of special inquiry on March 16 1948 on which occasion hearing was deferred to permit you to appeal to a medical board? A. Yes.

Q. You are advised that the oath that was administered to you on that occasion will continue in effect today. Do you understand? A. Yes.

47 Q. You are advised that this board is in receipt of a report from the Federal Security Agency, U. S. Public Health Service, U. S. Marine Hospital, Ellis Island, N. Y., dated March 26 1948, addressed to the District Director of this Service, referring to you and indicating that a Board of Medical Officers has considered your appeal and taking into consideration the certificate of March 11 1948 and the testimony given by Dr. Carlton Simon, with the result that it concurs with the certificate of March 11 1948. Such report bears the signature of J. Zinkin, Surgeon; F. D. Regan, Surgeon; and P. Lawler, Assistant Surgeon. Such report will be attached to the record of hearing and identified as

48 Exhibit #3.

I show you this report and ask you if you have any comment to make?

By counsel: No comment.

Chairman to applicant:

Q. Do you have any relatives in the United States? A. Yes, my aunt, Mrs. Olga Linstrum, 1346½ North Hayworth Avenue, Hollywood 46, California; and my cousin, Ethelle Wollz, 450 North Rosmore, Apartment 102, Los Angeles, California and her husband, Mr. Herman Wollz, 1450 Broadway, New York City.

Q. Do any of your relatives know that you have arrived in the United States? A. Yes, they do know.

By Counsel: All of her relatives know of her arrival, in fact, they have retained me in this case.

Chairman to applicant:

Q. Are your relatives in a position to maintain you in the United States should you gain entry and should that be necessary? A. Yes.

Q. Have you the present intention of marrying in the immediate future should you gain entry into the United States? A. No. 50

Q. You are advised that the certificate issued by the U. S. Public Health Service, which certificate has been affirmed by the Board of Medical Officers of the U. S. Public Health Service, renders you mandatorily excludable from the United States from which exclusion there is no appeal. Do you understand? A. Yes.

Q. Who is the Paul Corbett to whom you were destined in the United States? A. A friend of mine.

Q. What is the nature of your acquaintanceship with him? A. He is a friend of my friends and I am going to work for him. 51

Q. Is there a place in his home for you to live? A. Yes, he owns his own home worth approximately $25,000.

Q. Who is living in that home at the present time? A. His wife and two children and Mr. Corbett.

Q. Were you destined to Mr. Corbett to act as a domestic in his home or to care for his children? A. Just to help in the home.

Q. Have you ever met Mr. Corbett? A. No.

Chairman to counsel:

Q. Counsel, do you wish to question the applicant? A. Yes, I wish to ask her a few questions.

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April 6, 1948

Counsel to applicant:

Q. Have you or any of your friends or relatives requested the issuance or delivery to you of certificates of Swedish doctors who may have treated you prior to your departure from Sweden? A. Yes, my friend, Mrs. Obum, has written to doctors in Sweden.

Q. Have you received such statements from those doctors? A. Yes, I have heard that Mrs. Obum has received such information from my mother in Sweden.

53 Q. Do you wish to have an opportunity to submit such certificates? A. Yes.

Q. Do you wish that the Central Office of the Immigration Service review, if possible, the findings of the Board of Special Inquiry? A. Yes.

By counsel: Now I would like to make a statement for the record: First, I do request that this board furnish me with a copy of the record in this case as the alien's attorney. I furthermore request, if possible, that the Central Office of this Service review the findings of this board of special inquiry and in this connection I submit that from an exam-
54 ination of the record it appears that the only positive finding of mental defectiveness appears in the record of the ship's surgeon; and that the report of the Public Health doctor is, apparently, primarily based upon the report of the ship's surgeon; and I wish to call the attention of this board and the Central Office to the examination made by Dr. Carlton Simon, a qualified psychiatrist, and the report which he rendered and in which he states that in his opinion this alien is not psychotic and is not suffering from mental disturbance whatsoever. I wish to call the attention of this board and the Central Office also, to the fact that during the confinement of this alien at

55

Ellis Island she has deported and conducted herself in a normal and sane manner and has given no indication whatsoever of any mental disturbance; and I ask, in behalf of this alien, for the opportunity to produce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians, who may have examined her prior to her departure from Sweden, as to her past physical and mental history.

56

Chairman to counsel:

Q. If pursuant to your request it should be ordered that the applicant should be continued in detention pending the receipt of reports requested by you, is the applicant in a position to bear the expense of her continued detention if such should be necessary? A. I believe so, but in response to that question I respectfully request that if she is given the opportunity to submit further reports of her Swedish physicians, that she be released by the Central Office under parole or bond or whatever other conditions they may impose.

57

Chairman to board members: Are there any further questions?

By Inspector Mintzer: I have none.

By Secy. Fairbanks: I have none.

Chairman: On the evidence adduced in this case I propose the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1) that you are an alien a native and citizen of Sweden;

2) that you last arrived in the United States at the port of New York on March 1 1948 on the SS Stockholm;

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April 6, 1948

3) that you are an applicant for admission to the United States for permanent residence;

4) that you are in possession of valid Swedish passport;

5) that you are in possession of an unexpired quota immigration visa;

6) that there has issued in your case medical certificate certifying you to be "Mental Defective, Class A" which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.

59

CONCLUSIONS OF LAW: That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A.

By Inspector Mintzer: I concur.
By Secretary Fairbanks: I concur.

60

Chairman to applicant:

Q. Have you understood the findings of fact and conclusions of law arrived at and read to you? A. Yes.

Chairman: Motion is in order.

By Inspector Mintzer: MOTION: On the basis of the findings of fact and conclusions of law I move to exclude the applicant from admission to the United States.

By Secretary Fairbanks: I second the motion.
Chairman: Unanimous.

Minutes of Hearing of Board of Special Inquiry
April 6, 1948

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Chairman to applicant:

Q. You are advised that this board has voted to exclude you from admission to the United States and from this decision there is no appeal. Do you understand? A. Yes.

Q. If you are ordered deported from the United States you will be returned to the country whence you came at the expense of the transportation company that brought you here in like accommodations; and for a period of one year thereafter it will be unlawful for you to enter or attempt to enter the United States unless prior to your embarkation at a foreign port you have received permission of the Attorney General of the United States to reapply for admission to the United States. Do you understand? A. Yes.

62

Q. When and where did you purchase your transportation for this voyage and what was its cost? A. The ticket cost 802.80 Crowns and I bought it at the Swedish American Line Office in Stockholm, February 17, 1948.

Q. Were you at any time prior to embarkation examined by a physician on behalf of the transportation company that brought you here? A. None other than I presented my vaccination certificates.

Q. Had you been examined by a physician and questioned concerning your past personal history would you have told the examining physician the truth? A. Yes.

63

Q. You are advised that the Attorney General in his discretion may order return of your passage money. Do you understand? A. Yes.

FINE NOTICE ISSUED IN THIS CASE.

4:35 PM

I certify the foregoing consisting of nine pages to be true and correct transcription of the stenographic notes recorded by me.

A. P. FAIRBANKS.

A. P. Fairbanks, Secy.

64

Exhibit 1, Medical Certificate

Ellis Island, N. Y.
Station March 11, 1948

Name JOHNSON, MAY G.

Age 33 Sex Female

Nat. Sweden Race White

Date arrival 3/1/48

S.S. Stockholm

65 Class..... Manifest No.....

This is to certify that the above-described person has this day been examined and is found to be afflicted with—

MENTAL DEFECTIVE

Class "A"

B. PASQUARILLI, S. A. Surgeon.
C. W. MANGUN, Surgeon.

66

67

Exhibit 2, Statement of Ship's Doctor

Translation #2006

Year 1948 D: Insania
Month—February.

FEVER CHART

Name: Maj Jonsson, born April 27th, 1914—Swedish citizen, Cabin 82 H: Stockholm.

(Temperature is shown as bein 37° on Feb. 23, 1 point less on Feb. 25th and Feb. 29th)

2/23/48 Stating that she could not stand the sea, the patient would not go to the dining room, would only lie down, said she could not get up, became dizzy and felt weak. The waitress yesterday asked that food be brought to the cabin. The impression when visiting the cabin yesterday was that of a seasick person, but today the patient states that she feels herself persecuted—everybody looks at her. She also admits hallucinations. Has difficulty in sleeping. Hears cries, but does not know who it is crying. Sees "faces", don't know who they are, sees them only at night. Feels herself hunted. Tells that she gave wrong information to the Consul when obtaining her visa and thinks herself very sinful. 68 69

As one here has the impression of an incipient psychosis, it is decided to transfer the patient to the isolation ward of the ship's hospital.

Stat.: A rather pale woman of 33 years of asthenic physique. No "incompensation" indications.

Throat: O Lungs: O Cor: O Abdomen: O

Exhibit 2, Statement of Ship's Doctor

2/24 The patient reveals that she was treated at home for insanity by a doctor for a half year, two years ago. State that during the last week, she has progressively felt more and more strangely. Is going to America to work for a man by name of Corbett in Ill.? A cousin and a friend is said to live in New York. Her friend would meet her when she arrived.

In the evening she becomes agitated and restless, and it becomes necessary to calm her with Mo-sc. She again says that she is sinful and that it was just as well if she could die. Thinks nobody wants anything to do with her.

2/29 During the whole time it has been necessary to care for her and feed her, has on several occasions refused to eat. Has been apathetic, lying down and dozing, and not shown interest in anything. Not strong enough to do anything, she says. Not strong enough to read.

Today in the afternoon the patient clears up remarkably. Says she has no recollection of a lot of strange thing she had said before. Slept well last night. Eats by herself (without help) Denies having any hallucinations. Looks considerably better.

The above translation from the Swedish language was made by the undersigned.

K. R. HELANDER
Interpreter

Immigration & Naturalization Service
Mar 16 1948

Exhibit 2, Statement of Ship's Doctor
(Swedish Translation)

SPECIAL ATTENTION KSPAS
ELLIS AND HOSPITAL

23.2.48: Under uppgivande att hon ej tålde sjön ville pat. ej gå till matsalen ville bara ligga sade sig ej kunna gå upp, blev yr och kände sig svag. Uppsasserskan begärde i går bång för mat till hytte. Man fick vid besök i hytten i går intrycket av en sjösjuk person, men i dag meddelar pat. att hon känner sig förföljd- alla människor tittar på henne. Hon medger även hallucinationer. Har svårt att sova. Hör skrik. Men vet inte vem som skriker. Ser " gubbar", vet inte vilka de äro och hon ser dem bara på nätterna. Känner sig jagad. Talar om att hon lämnat felaktiga upplysningar till konsuln i gid erhållande av visum och tycker att hon är mycket syndig.

Då man här har intrycket av en uppseglande psykos bestämmer man sig för att överföra pat. till issoleringsrummet på sjukavdelningen

Stat. : En asthenisk byggd, kx rätt blek 33 årig kvinna. Inga inkompensationstecken.
Svalg: 0 Pulm: 0 Cor: 0 Buk: 0.

24.2: Pat. talar om att hon skulle ha skötts i hemmet för sinnessjukdom under ett halvår för 2 år sedan av läkare.. Säger att undersenaste veckan successivt känt sig allt mer besynnerlig. Åker över till U.S.A. för att börja arbeta hos en man vid namn Cornet i Ill.? En kusin och en väninna skall bo i N.Y. Väninnan skulle komma och möta henne vid ankomst

På kvällen blir hon agiterad och orolig och man blir tvungen att lugna henne med Mo-sc. Hon talar åter igen att hon är syndig och att hon lika gärna kunde få dö. Tror inte att någon människa vill veta av henne..

29.2: Har hela tiden fått skötas och matas. Har vid flera tillfällen vägrat att äta. Varit apatisk legat och dåsat och inte visat intresse för något. Orkar inte något , säger hon. Orkar inte läsa.

I dag på e.m. klarnar pat. upp anmärkningsvärt Säger sig ej ha något minne av en hel del egendomliga saker som hon sagt tidigare. Sovit gott i natt Äter själv. Förnekar hallucinationer. Ser betydlig piggare ut.

Exhibit 3, Report of Boards of Medical Officers

FEDERAL SECURITY AGENCY
U. S. PUBLIC HEALTH SERVICE

March 26, 1948

IN REPLYING, ADDRESS THE
U. S. Marine Hospital
Ellis Island, N. Y.

BSI 70 ~~Col Ave~~
3/25/48

To: District Director, Immigration and Naturalization Service

Subj.: May Gunborg Johnson; Report of a Medical Board, Mar. 25, 1948; Your File: 0300-221545; SI/PX&PU. 4/1

1. Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject-named alien May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Joseph Zinkin
J. ZINKIN
Surgeon (R)

F. D. Regan
F. D. REGAN
S.A. Surgeon, USPHS

P. Lawler
P. LAWLER
Asst. Surgeon (R)

edo
enc.

Respectfully forwarded:
L. E. HOOPER, Medical Director
Medical Officer in Charge

Exhibit 3, Report of Boards of Medical Officers 79

To: District Director, Immigration and Naturalization Service

Subj.: May Gunborg Johnson; Report of a Medical Board
Your File: 0300-221545; SI/PX&PU.

Date: March 25, 1948. Alien represented by Medical Witnesses: Dr. Carlton Simon, 50 E. 58 St., N.Y.C.

The verbatim replies of the Medical Witness; to the following questions are:

Dr. Zinkin: 80

a. Do you regard yourself qualified to testify as a medical expert concerning this alien's mental condition?

I do.

b. On which special training and experience do you base your qualifications to testify as an expert on this case?

I was former psychiatrist to the Narcotic N. Y. S. Commission; consulting psychiatrist in U. S. Induction Center, N. Y. C.

c. What opportunity have you had to make personal examinations of the alien, and what have your examinations comprised? 81

For practically one hour I have been in contact with the patient. Have gone over the past history as far as is available to me and personal history which was given by her. I find that she was born on May 27, 1914. She has three brothers. Only had measles and mumps as a child. Had injections for anemia in 1945. Had some episode in 1945 which she states was due to the fact—and that it was a combination of hard work and at that time was diagnosed as well—lack of vitamins; had lost 10 pounds of weight; had broken her engagement with a man. I know she was

very much in love with another man. The man with whom she was engaged kept calling her up on the phone 4 or 5 times a day; got her frightened and panicky. Liquor has a particularly bad effect upon her she states. Prior to coming on board ship, Stockholm, for her trip to the U. S., she had several days of partying with friends and drank quite heavily. She took bromide the first night on board and in general, was quite exhausted prior to coming on ship. She also took some sleeping capsule, the exact nature of which she does not know. She denies hearing voices or
83. seeing things. Remembers being excited because the doctor insisted on taking her blood pressure. She resisted because she wanted peace and sleep and in order to get rid of the physician's presence, she acquiesced in the affirmative. She however denies seeing faces or hearing voices of physicians at Ellis Island. At present, she is normal. Has no amnesia. Has good memory. No evidence of psychosis. No Romberg. Reflexes normal. Has good insight; is not depressed or unduly elated. Due to bromides and depressive drug intoxication combined as well with previous reaction from drinking. I do not think she is psychotic.

Dr. Zinkin:

84

How long in hospital previously?

She was not in a hospital. She was at home. She was panicky, excited. The man kept phoning her 5 times a day and I guess she was emotionally disturbed. (What about her alcoholism?) She is not suffering from alcoholism. She cannot take much. She is not an alcoholic.

(She denies having had hallucinations?) She says she was so sleepy and so tired that she wanted to have her food sent to her room. The doctor disturbed her and he annoyed her and waited to take her blood pressure. She resisted and in order to get rid of him, kept saying "yes, yes."

Exhibit 3, Report of Boards of Medical Officers 85

Dr. Zinkin:

We have a report from the ship's doctor. (Reads note from ship's doctor). Well, there is no evidence of manic depressive condition there. She seems to be logical and well balanced. By the way she speaks English. I didn't know. I think there is something emotional, but most women are. There is no difficulty in her menstrual periods. She is normal in every way. (Would you say that the episode aboard ship was a psychotic one?) I would not say it is psychotic. I would say that it is a toxemia. The bromides would give delusions. (What is a psychosis 86
then?) I would not call it a psychosis. It is a toxemia. I mean there was nothing permanent. She explains why she answered that way. I think she must have been seasick. (How many bromides did she take?) She says she had 2 tablets.

Dr. Zinkin (Interviewing with the alien—May Gunborg Johnson).

(What happened on the ship?) Yes, but I speak terribly bad English. I come aboard and I go to bed and (Were you drinking,—drunk?) No, but I have been to many many parties before I come on board. Many people say 87
good-bye to me and I have much to do). (What happened on the ship?) I asked what you call up the maid if I could eat in my bed, so I could sleep for 2 or 3 days. (Were you seasick?) Yes, I was. I went out in toilet and gave up something. She said I could not just eat in my bed. She said doctor's orders. (Did doctor come up to see you) Yes. I call the doctor the second day, the day after I come aboard and there come a nurse and she took the temperature you know and she said it is nothing, and the doctor come and say get up. I feel very very tired. (Did you take any medicine before the doctor saw you) Yes, I took two

88 *Exhibit 3, Report of Boards of Medical Officers*

bromides. (How big) Small. Just 2 and one sleeping pill. (You had been taking sleeping pills before, they didn't make you sick) Not a capsule, a little tablet. (Had been taking those before when you needed them in the past and they never made you sick, but put you to sleep) Yes. I have taken it before.

Dr. Lawler:

(Where get these pills) In the apothecary. I had just four and—of them. Some headaches pills and 2 or 3 little
89 sleeping pills. (When you came on board, took one bromide and one sleeping pill) yes.

Dr. Zinkin:

(You remember when the doctor came) There was another girl in the same cabin and she had a vaccination and she was come on board. When we get down, they put me in a little room. (Why put you there) May be they think something was wrong with me. Absolutely not, Complain nothing. I went to sleep and I slept the whole trip over. (You don't know why they put you in that room) I sleep at first and they come in and he ask me some
90 questions and I say yes to everything and he took the pulse and I was hysteric. (Why) I was just tired. But I remember every word. Everything. (When let you out of that room) I was better the last day.

Dr. Regan:

(At the time you was sick did you have any unusual sensations) (Did you happen to see things like bad looking animals) No I never seen any in my life. The doctor ask me, did you hear voices? I said yes. He said, describe it. I said yes, to everything he ask, I didn't see anything. I said, yes, yes, because I was tired and I wanted to be

alone. I have never seen faces in my life. (Have sensation somebody was watching you or talking about you) No. (Did you wonder why you was in that room) No.

Dr. Zinkin:
Dr. Regan:

(All the doctor wanted you to do was go to the dining room) I think I will first take a rest for 2 or 3 days and after that I would go to the dining room. I was not afraid to go to the dining room. They say to me should we lock the door. I said yes, lock the door. (Was the door 92
kept locked) No. If I wanted to I could go out. (Did you have a key to open the door) No, I could just ring, if I wanted to get out. (Would they let you go out yourself) If I wanted to. I liked to stay in bed. (Why) Because I was completely overworked and tired. (How about when you were in the hospital here) Did I stay in bed the whole time? No. You must understand I come just from the ship and was sick and misunderstood and over to this place and I am here since March 1st, and then over to Immigration. I am a month here and it is very hard. I find everybody very nice here. (Where going to) To Chicago—In Illinois. I should work in Mr. K..... home first so I 93
could learn English. I think I would do the same work as I did in Sweden. In film office. I take the orders for the films. (Eat well on the ship) It was very good. I wasn't hungry so I say, no thank you. (Did you think there was something wrong with the food) No. No. It was very good food. There was nothing wrong. I was just very tired.

Dr. Zinkin:

(It will read to you what the ship doctor said) (reads report). (Why) He take my pulse. He said something

I don't like. (What). I said God help me. He said, how did something like you have trust in God. (Why did he say that) I don't know. The first word he said when he come in my cabin he said, "How did she get on board." (Were you drunk when you came on board No. I didn't drink. Just have parties before I get away and my mother was very sorry and I was sorry too and there was so many things. He is not a gentlemen, you know. He put me here and said "I will give her a chance to go into the U. S. and he write a report that I was a little mixed up. (Were you mixed up) I don't know. I sleep and I say yes to everything you know.

Decision of Judge Rifkind of June 10, 1948

The only criticism offered is that the Board of Special Inquiry accepted the certificate of the surgeon of the U. S. Public Health Service and rejected that of the alien's own physician. That is not enough to entitle the alien to relief by habeas corpus. The writ is discharged and the alien remanded.

June 10, 1948.

S. H. Rifkind,
D. J.

Order to Show Cause Why the Proceeding Should Not be Re-argued

97

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

[SAME TITLE]

Upon the annexed affidavit of Gunther Jacobson, sworn to June 18, 1948, and upon the petition and writ herein, and upon the decision of the Honorable Simon H. Rifkind herein, let the respondent herein by John F. McGohey, the United States Attorney, show cause at Room 506 of the United States Court House on June 22, 1948, at 10:30 A. M., or as soon thereafter as counsel can be heard, why the within habeas corpus proceeding should not be re-argued; why the decision of Hon. Simon Rifkind dismissing the writ should not be set aside and modified; and why the writ of habeas corpus herein issued and served should not be sustained; why the relator should not be afforded such other and further relief as may seem just to this court.

98

99

AND IT IS FURTHER ORDERED, that pending the deliberation of the decision on this motion, the deportation of the respondent be stayed.

Sufficient cause appearing, let service of a copy of this order, together with the affidavit on which it is based upon the United States Attorney on or before June 21st, 1948, be sufficient.

Dated: New York, N. Y.,
June 19, 1948.

JOHN W. CLANCY,
U. S. D. J.

ENTER

100

Affidavit of Gunther Jacobson in Support of Motion for Re-argument

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK,)
101 COUNTY OF NEW YORK,) ss.:

GUNTHER JACOBSON, being duly sworn, deposes and says:

I am the attorney for the relator, having succeeded the previous attorney herein, Mr. Haskell R. Barst.

I respectfully apply for reargument of this case upon the following grounds:

1. This is a habeas corpus proceeding, arising from the following facts and circumstances:

The relator herein is a native and citizen of Sweden, a woman of 33 years of age and unmarried. She arrived in
102 the United States on the Swedish Steamship "S.S. Stockholm" on or about March 1st, 1948, with a Quota Immigration Visa to the United States, which was duly issued, as an immigrant for permanent residence. She has been detained since arrival at Ellis Island, and given admission hearings before a Board of Special Inquiry on March 16, 1948, and on April 6, 1948. As a result of these hearings, she was excluded from admission to the United States on the ground that she is mentally defective.

When the relator was on board the S.S. Stockholm during her voyage from Europe to the United States, she became very seasick, which condition was aggravated by the fact that apparently she had celebrated her departure to

the United States with friends before boarding the ship and was somewhat strained by the effect of the farewell parties. In view of her seasickness, she was unable to take her meals in the dining room, and requested service thereof in her stateroom which, according to the strict rules of the steamship line, requires a doctor's certificate. The ship doctor then examined her, and upon arrival at the Port of New York, informed the Immigration Service that he questioned the sanity of the respondent. 103

The relator maintains that this report of the doctor was caused by ill-will as he had behaved in a fashion not becoming to a gentleman. 104

In any event this information from the ship's physician caused the trouble in which the relator now finds herself. Relator's writ of habeas corpus was dismissed about a week ago.

2. The decision of the Board of Special Inquiry herein is tainted by legal error in that the Board assumed it had no power to make its own finding of the mental condition of the relator.

The minutes of the hearing before the Board of Special Inquiry show that on March 16, 1948, the presiding inspector at the end of the hearing, advised the relator as follows: 105

> "You are advised that the certification entered in your case renders you mandatorily excludable so far as this Board is concerned, from which exclusion there is no appeal."

At the same hearing towards the end, the Board made the following conclusion of law:

> "That you are inadmissible to the United States under Section 3 of the Immigration Act of February

106 *Affidavit of Gunther Jacobson*

> 5, 1947, as you have been certified by surgeons of the United States Public Health Service to be mentally defective, Class A."

It is quite obvious that the Board of Special Inquiry proceeded on the theory that it was bound by the Certificate of the Government Physicians, and had no power to make its own findings with respect to relator's mental condition. This attitude of the Board of Special Inquiry is contrary to law.

107 *Section 153 of Title 8, U.S.C.*, last sentence, reads:

> "* * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and except as provided in Section 158 of this title, shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 136 of this title."

It is apparent that, while the decision of the Board "shall be based" upon the findings of the medical officers,
108 the Board is not degraded thereby to a rubber stamp. If that had been the intention of Congress, the Board would have been entirely abolished in mental cases. The courts have consequently held that the Board is not bound by the opinion of the Medical Board and that it, in reaching a decision, had to consider *all* evidence brought to its attention. See *Ex parte Joyce*, 212 F. 282. There is a line of decisions supporting this view, which will upon reargument be spread before this Court in a memorandum of law. I confine myself at this moment to citing:

> *Billings* v. *Sitner*, 228 F. 315,
> *Ex parte Liang Buch Chew*, 296 F. 182;

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435;
U. S. ex rel Powlowee v. *Day*, 33 F. (2d) 267 (C. C. A. 2nd).

Again in the interpretation here urged of the statute is directly and clearly expressed in another section of the Immigration Laws, in Section 136(d), Title 8, U. S. C., where it is said that among the aliens excluded from admission into the United States are:

> "Persons * * * who are found to be and are certified by the examining surgeon as being mentally 110
> defective, * * *"

The alien when certified by the surgeon must still be "found to be" mentally defective. This "finding" is the office of the Board of Special Inquiry, which in the present case, contrary to the law, emasculated itself to a rubber stamp of the government physicians.

Under the circumstances, the Court is respectfully urged to proceed pursuant to Section 10 of the Administrative Procedure Act, and to set aside the exclusion order of the Board of Special Inquiry herein because they are arbitrary, capricious and otherwise not in accordance with 111
law, and because they are short of statutory right and because they are without observance of procedure required by law.

It is respectfully called to the attention of the Court that the provisions of the Administrative Procedure Act apply to immigration cases, as has been held by Judge Holtzoff in *Lindenau* v. *Watkins*, 73 Fed. Supp. 216.

3. This motion is further predicated on the ground that the Board of Special Inquiry herein was improperly constituted in that its members do not qualify under Section 5c, 7 and 11 of the Administrative Procedure Act of

1946. That the Administrative Procedure Act applies to the present proceeding has been pointed out before. The exact reasoning on which it is claimed that the Board herein does not qualify with reference to the Administrative Procedure Act will be submitted to the Court in a subsequent memorandum. For the present moment, however, it may suffice to state that Judge Allen Goldsborough recently in a decision not yet reported, enjoined the Department of Justice from continuing deportation hearings against the notorious Communist Eisler on the ground that the immigrant inspector who held the hearings was not a qualified examiner pursuant to Section 11 of the Administrative Procedure Act. This point requires careful preparatory legal work, which will be precipitated into a brief to be submitted at the hearing herein.

4. The Court's attention is further called to the fact that there were two hearings before the Board of Special Inquiry, one on March 16th and one on April 6, 1948. The Board of Special Inquiry was each time composed of different members. It is respectfully submitted that it is contrary to law to have the Board change its composition while the hearings in a case are in progress.

5. It is urged that the procedure administered to this alien, for the reasons stated, is contrary to the Due Process Clause of the Constitution of the United States, 14th Amendment.

6. It is urged that the findings of the Medical Boards herein and of the Boards of Special Inquiry are tainted with legal error, not based upon substantial evidence and arbitrary and capricious, in that all findings against the alien are based solely upon a report of the Swedish physician of the S.S. Stockholm, on which the relator arrived.

This physician was never heard under oath and never produced for cross-examination. He behaved, as I have been informed by the alien, in an "ungentlemanly" way toward her, and his report, it is submitted, is the result of malice. He has, as the record shows, prompted I surmise by remorse, subsequently withdrawn his charges.

Under the circumstances, all findings of both Boards—the Immigration Board and that of the physicians—are based upon inadmissible evidence and make the procedure before both boards objectionable.

That administrative findings under the Administrative Procedure Act must be based upon "substantial evidence" has been held in *Lindenau* v. *Watkins*, 73 F. Supp. 216.

7. The findings of the medical examiners are defective in that they did not show what these eminent physicians call "mentally defective". Most persons who walk this earth are "mentally defective" in that they do not attain that peak of mental alacrity that we admire among the great and outstanding. A decision that just classifies a person as mentally defective without stating the nature of the defect is no decision at all in that it does not show that a deviation from the normal and average has been diagnosed that disables the alien from functioning without disturbing society.

See:

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435.

8. There is nothing in the record to show that the examining government physicians qualify under Section 152, Title 8, U. S. C., in that they had at least two years' experience in the practice of their profession since receiving the degree of doctor of medicine; as a matter of fact, there is no proof that they got any degrees at all and that they all were "medical officers of the United States Public

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Health Service". The certificate should show on its fac that it was issued by duly qualified physicians. In view o the absence of such showing of the qualifications and be cause I have been informed that some of the examinin physicians were quite young, it is urged, on informatio and belief, that the medical examiners were not qualifie to act under Section 152, Title 8, U. S. C.

See:

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435.

119 9. The examination by the medical examiners wa unfair and contrary to law in that this alien, unfamilia with our language, was examined without the help of a interpreter. Section 152, Title 8, U. S. C., expressly pro vides that "the services of interpreters shall be provide for such examination. This section of the statute was no complied with.

10. It is respectfully urged that this young lady i exceptionally mentally alert, of fine character and deport ment, and in her present trouble because of the vindictive ness of the Swedish physician.

120 11. The writ herein having been dismissed by Judg Rifkind about a week ago, the relator is subject to immedi ate deportation and the proceeding by order to show caus is necessary in order to prevent her deportation before th present motion is decided, for which no previous applica tion has been made to any court or judge.

WHEREFORE, it is respectfully prayed that this Cour may grant reargument so that the points urged in this af fidavit may be spread before this Court.

GUNTHER JACOBSON

(Sworn to on June 18th, 1948.)

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Opinion of Judge Rifkind Upon Re-argument

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

[SAME TITLE]

Appearances:

122

GUNTHER JACOBSON, ESQ., Attorney for Relator.

JOHN F. X. MCGOHEY, ESQ., U. S. Attorney, for Respondent, by WILLIAM J. SEXTON.

RIFKIND, *D. J.*

A writ of habeas corpus, issued on a petition challenging the detention of May Johnson (whom I shall call the Relator) under an order of exclusion, was discharged on June 10, 1948. She has brought on a motion for reargument and has advanced several grounds for her discharge not previously asserted.

123

The following facts are not disputed: Relator is 33 years of age, a native of Sweden. She arrived at the Port of New York on March 1, 1948, in possession of a valid visa for permanent residence in the United States. She was examined by surgeons of the U. S. Public Health Service and certified to be mentally defective. On March 16, 1948, she was accorded a hearing before a Board of Special Inquiry, at the conclusion of which she was advised as follows:

Q. You are advised that the certification entered in your case renders you mandatorily excludable insofar as this board is concerned, from which exclusion there is no ap-

124 *Opinion of Judge Rifkind Upon Reargument*

peal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service, at which time you may be represented by a physician of your own selection to give testimony in your behalf. Do you wish to appeal to such a Board? A. Yes, I wish to appeal.

Thereafter she appealed to a Board of Medical Officers of the U. S. Public Health Service which examined the Relator and heard testimony from a physician called by her. It concurred in the original certificate. On April 6, 1948,
125 Relator again had a hearing before a Board of Special Inquiry at which she was represented by counsel and had the assistance of an interpreter. The Board made findings of fact, including, "(6) That there has issued in your case medical certificate certifying you to be 'Mental Defective, Class A' which certificate has been affirmed by a Board of Medical Officers pursuant to your appeal to such a Board." It also reached a conclusion of law, "That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A.".

126 Relator's first specification is that the Board of Special Inquiry made no independent finding that she was mentally defective; that it regarded itself as bound by the certificate. I agree that the Board acted in reliance upon the certificate but I hold that in so doing it acted within the law. Section 136 of Title 8 U. S. C. provides as follows:

> "The following classes of aliens shall be excluded from admission into the United States: * * * (d) Persons not comprehended within any of the classes enumerated in paragraphs (a), (b) or (c), who are found to be and are certified by the examining sur-

geon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living—."

Section 153 of the same title provides:

"The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in Section 158 of this title, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with 128
any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 136 of this title."

Relator relies upon *Ex parte Joyce*, D. Mass., 1913, 212 Fed. 282; *Billings* v. *Sitner*, C. C. A. 1, 1915, 228 Fed. 315. Both of these cases were decided under the 1907 statute, whereas the instant case is under the 1917 Act. The 1907 statute, Act of February 26, 1907, c. 1134, Sec. 10; 34 Stat. 901, did not provide that the decision of the board of special inquiry "shall be based upon the certificate." It pro- 129
vided merely "that the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final" in stated instances.

Relator also relies on *Ex parte Liang Buck Chew*, D. Mass. 1923, 296 Fed. 182. That case came up under the 1917 Act. Even that is distinguishable in that the alien was there excluded under Section 136(c), whereas here the Relator has been found to belong under 136(d). There is a striking difference in the language of the two subsections. The exclusion of 136(d) is not directed against

"mental defectives" but against persons "who are found to be and are certified by the examining surgeon as being mentally * * * defective." I do not emphasize this distinction. Judge Patterson, in *U. S. v. Reimer*, S. D. N. Y. 1938, 25 Fed. Supp. 552, in the case of an alien excluded under Section 136(c) held that the determination of the examining medical officer was decisive. He noted that "apparently the rule in the First Circuit is the other way."

I conclude that the first specification is without merit.

Relator's second specification is that the Board of Special Inquiry was not constituted in compliance with the
131 Administrative Procedure Act, 5 U. S. C. A. Section 1010. Assuming that to be so, such boards have a dispensation accorded to them by Section 1006 of the Act, which, so far as is pertinent, reads as follows:

> "(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or
> 132 other officers specially provided for by or designated pursuant to statute."

Boards of special inquiry operating under the Immigration Act are "specially provided for by or designated pursuant to statute" 8 U. S. C. A. 153.

Finally, Relator objects that the certificate of the examining surgeons does not disclose that they have had "especial training in the diagnosis of insanity and mental defects" as prescribed by 8 U. S. C. A., Section 152.(1) It is to be noted that the Relator does not assert that they lack that qualification. The presumption of regularity in

the conduct of official business, it seems to me, is sufficient to preserve the validity of the certificate, at least, in the absence of an affirmative showing of non-compliance with the statute.

The motion for reargument is granted, and upon such reargument the original decision is adhered to.

Dated: July 6, 1948.

SIMON H. RIFKIND,
U. S. D. J.

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(1) Cf. U. S. v. Day, C. C. A. 2, 1929, 33 Fed. 2d 267 and U. S. v. Day, S. D. N. Y. 1930, 45 Fed. 2d 435.

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136

Order Appealed From

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 45-577

[SAME TITLE]

The writ of habeas corpus in the above-entitled matter
137 having come on to be heard before this Court on the 28th day of May, 1948, and after hearing Haskell R. Barst, Esq., attorney for the relator, in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of counsel), in opposition thereto, and upon the petition for the writ of habeas corpus, the return thereto, and all the papers and proceedings had herein it is

ORDERED, that the writ of habeas corpus be dismissed, and it is

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FURTHER ORDERED, that the relator be remanded to the custody of the Commissioner, Immigration and Naturalization Service, at Ellis Island, New York Harbor, N. Y.

Dated: New York, N. Y., July 6, 1948.

SIMON H. RIFKIND,
U. S. D. J.

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Notice of Appeal

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

THE UNITED STATES OF AMERICA, upon the relation of INGA OBUM,

against

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W. F. WATKINS, District Director of the IMMIGRATION AND NATURALIZATION SERVICE in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON, relator.

Sir:

PLEASE TAKE NOTICE that the May Johnson, the person in custody and the relator herein, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final order dated July 6th, 1948, dismissing the writ of habeas corpus herein and remanding the relator to the custody of the Commissioner of Immigration and Naturalization, and this appeal is from the whole of said order and from each and every part of said order.

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Dated, New York, July 23rd, 1948.

Yours, etc.,

GUNTHER JACOBSON,
Attorney for the Relator,
Office and P. O. Address,
36 West 44th Street,
New York City.

To:

1. JOHN F. X. MCGOHEY, ESQ.,
U. S. Attorney for Respondent.

2. CLERK U. S. DISTRICT COURT,
Southern District, N. Y.

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Stipulation as to Record

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,
Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,
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Respondent-Appellee.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter and agreed upon by the parties and that both parties may hand up to the Court, upon the argument of the appeal, the originals of any and all exhibits used in the proceeding in the District Court.

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Dated, New York, September 1st, 1948.

GUNTHER JACOBSON,
Attorney for Relator-Appellant.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellee.

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Clerk's Certificate

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,
Relator-Appellant

against

W. FRANK WATKINS, District Director of the Immigration
149 and Naturalization Service in the New York District, or
such other person, if any, who may have the custody of
MAY JOHNSON,

Respondent-Appellee

UNITED STATES OF AMERICA,
SOUTERN DISTRICT OF NEW YORK, } ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of
United States of America for the Southern District of New
York do hereby certify that the foregoing is a correct tran-
150 cript of the record of the said District Court in the above
entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the
said Court to be hereunto affixed, this -day of Sep-
tember, 1948, in the year of our Lord One Thousand Nine
Hundred and Forty-eight and of the Independence of the
said United States the one hundred and seventy-second.

WILLIAM V. CONNELL,
Clerk

[fol. 51] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1948.

No. 67

Argued November 4, 1948 Decided November 29, 1948.

Docket No. 21095

UNITED STATES OF AMERICA, ex rel. MAY JOHNSON, Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson, Respondent-Appellee.

Before: L. Hand, Augustus N. Hand and Clark, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From an order dismissing a writ of habeas corpus and remanding the relator May Johnson to the custody of the Commissioner of Immigration and Naturalization, the relator appeals. Affirmed.

[fol. 52] Gunther Jacobson, Attorney and counsel for relator May Johnson.

John F. X. McGohey, United States Attorney, for respondent; William J. Sexton, Assistant United States Attorney, and Alvin Lieberman, Attorney, Immigration and Naturalization Service, United States Department of Justice, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The relator, a native and citizen of Sweden, arrived at the Port of New York on March 1, 1948, and applied for admission into the United States as a quota immigrant. Upon arrival she was examined by medical officers [hereinafter referred to as examining surgeons] of the United States Public Health Service who found her to be mentally defective, and made a certificate to that effect.

On March 16, 1948, she was accorded a hearing before a Board of Special Inquiry upon her application for admission at which hearing the above mentioned certificate was received in evidence. This hearing was suspended to permit the relator to appeal from the certificate issued by the examining surgeons to a board of medical officers of the United States Public Health Service convened by the Surgeon General.

On March 26, 1948, the medical board, after considering all the evidence including the certificate and the testimony given by one Dr. Carlton Simon, a psychiatrist chosen by the relator pursuant to Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) to appear as her expert medical witness before the board, reported that it concurred with the examining surgeons' certificate.

[fol. 53] The hearing before the Board of Special Inquiry was resumed on April 6, 1948, at the conclusion of which that board, after introducing into the record the report of the medical board, made the following findings of fact and conclusion of law (the word "you" as used in the findings and conclusion referring to relator):

"Findings of Fact:

1. that you are an alien, a native and citizen of Sweden;

2. that you last arrived in the United States at the port of New York on March 1, 1948 on the SS Stockholm;

3. that you are an applicant for admission to the United States for permanent residence;

4. that you are in possession of valid Swedish passport;

5. that you are in possession of an unexpired quota immigration visa;

6. that there has issued in your case medical certificate certifying you to be 'Mental Defective, Class A' which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.

Conclusions of Law: That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been

certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A."

[fol. 54] It is argued on behalf of the relator that the Board of Special Inquiry made no independent decision as to whether she was mentally defective but merely followed the conclusions of the certificate of the medical board of the Public Health Service to which the relator had taken an appeal pursuant to Section 16 of the Immigration Act of 1917, 8 U. S. C. A. §152. We think that the conclusion of the medical board was binding on the Board of Special Inquiry within the meaning of Section 17 of the Act of 1917 (8 U. S. C. A. §153). That section provided that:

> "The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section 3 of this act."

The relator insists that the Board of Special Inquiry was not bound by the opinion of the medical board and in reaching its decision should not have rejected evidence offered to show that she was sane. Reliance is placed on decisions of Judge Morton in the District Court of Massachusetts to support the contention that the medical certificate was not final in respect to the relator's mental state and to the decision of the Court of Appeals of the First Circuit to the same effect. *Billings* v. *Sitner*, 228 Fed. 315; *Ex parte Joyce*, 212 Fed. 282, 285 (D. C. Mass.). These decisions were made under the Immigration Act of 1907. Section 10 of that act provided that the decision of the Board of Special Inquiry "based upon the certificate of the examining medical officer, shall be final." Judge Dodge writing for the Court of Appeals in *Billings* v. *Sitner*, 228 Fed. 315, 316, said:

> [fol. 55] "* * * Although immigration rule 17, subdivisions 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that if has no right to do so without exercising its own judgment, after considering not only the certificate, but whatever other evidence there may be touching the

alien's right to enter. The District Court had previously so held in another case. Re Joyce, 212 Fed. 282, 285."

It is to be noted that Section 17 of the Immigration Act of 1917 substituted for the words of Section 10 of the Act of 1907, which appear in the margin,[1] the following:

> "That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physi- [fol. 56] cal disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act."[2]

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[1] "That the decision of the board of special inquiry based upon the certificate of the examining medical officer shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act."

The pertinent provisions of Section 2 of the Act of 1907 are as follows:

"That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; * * *"

[2] Section 3 of the Act of 1917 contains language substantially identical to that of Section 2 of the Act of 1907.

The Report of the Senate Committee made at the time of the enactment of Section 17 of the Act of 1917, as published in Sen. Rep. 352, 64th Cong., was as follows:

> "* * * Section 10 of the Act of 1907 making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect has been added to this section as a proviso * * * but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of purely medical nature must be determined by members of the medical profession."

It seems clear that the "recent court decisions" referred to in the above Senate Report were those of the federal courts of the First Circuit. No others existed which have been called to our attention. The report plainly indicates the Senate Committee's view that these decisions did not properly construe Section 10 of the Act of 1907. In such a setting, the words of Section 17 "that the decision of a [fol. 57] Board of Special Inquiry shall be based upon the certificate of the examining medical officer" inevitably indicate that the Board must adopt the findings of the certificate on such medical questions as are here involved. What else can be meant by the words: "on medical questions the opinions of doctors as against that of laymen should prevail." A certificate by the medical board if its action conformed to the statute and regulations and its decision was made after a fair hearing was plainly intended to be conclusive.

In *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. Mass. 1923), Judge Morton dealt with the finality of a medical certificate under the provisions of the Act of 1917. He in effect adhered to the decisions in the First Circuit interpreting the Act of 1907, but made no mention of the Senate Report which probably had not been called to his attention and rested his decision that the medical certificate was not final largely upon language in Section 16 of the 1917

Act that the certificate was "for the information * * * of the boards of special inquiry." Undoubtedly it was for the information of the latter, who under no circumstances could act without having it before them. That the Board of Special Inquiry was not bound to base its decision, so far as it involved medical facts, upon the certificate does not follow from the terms of the Act of 1917 and seems directly contrary to the Senate Report and its expressed purpose. In this connection, we must remember that the language of the Act of 1917 so heavily relied on by Judge Morton is also to be found in Section 17 of the Act of 1907, so that his reasoning fails to answer the clear implications of the Senate Report.

The views we have expressed as to the effect of a certificate by the medical board are in accord with the decision of this court in *United States ex rel. Fink* v. *Tod*, 1 F. 2d, 246. The primary question in that case was whether the [fol. 58] Secretary of Labor could reopen hearings which had been held by the medical board. We decided that he could not, saying in that connection:

> "* * * The statute declares that the board of special inquiry shall base their decision upon the medical certificate. We can only interpret this to mean that the medical certificate is conclusive as to the physical and mental condition of the alien examined. And we do not think it was intended that the board of special inquiry constituted of nonmedical men should have the right to sit in review upon decisions of medical questions rendered by a board of medical officers or by a medical inspector. If such was not the intention, why require that the decision of the board of special inquiry 'shall be based upon the certificate of the examining medical officer'?"

This court finally said in denying an application for reargument that a Board of Special Inquiry could, on such grounds as fraud or newly discovered evidence, order the medical board to reopen hearings, but that the Secretary of Labor could not. We plainly held that in the absence of such a reopening at the behest of the board, the medical certificate was to be regarded as conclusive. The contention that our former decision no longer represents the law because it was reversed by the Supreme Court on confession

of error, 267 U. S. 571, is without merit. We have no reason to regard a reversal on confession of error as indicating any decision on the merits by the appellate court. We cannot know what considerations moved the government to confess error in a case which had been pending for two and a half years and in which the medical experts had widely differed.

[fol. 59] The Court of Appeals of the Ninth Circuit in *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248, is said to have reached a decision contrary to that in the *Tod* case respecting the conclusiveness of a medical certificate. While certain language in the opinion warrants this contention, we think the decision necessarily involved only the right of the Board of Special Inquiry to reopen the proceedings before the medical board. In the case at bar, no reopening was attempted so that we do not have before us the critical question facing the Ninth Circuit regarding the right of the Board of Special Inquiry to reopen, as to which the opinion cannot be said to have differed with our decision in *United States ex rel. Fink* v. *Tod*, *supra*.

In *United States ex rel. Frumcair* v. *Reimer*, 25 F. Supp. 552 (S. D. N. Y.), Judge Patterson decided that the language of Sections 16 and 17 of the Immigration Act of 1917 rendered the medical certificate conclusive and precluded the Board of Special Inquiry from hearing additional testimony calculated to overthrow the certificate. We are in accord with the reasoning and decision of Judge Patterson.

The contention that the Board of Special Inquiry was not properly constituted under Section 11 of the Administrative Procedure Act (5 U. S. C. A. §1010) is fully met by Section 7 of that Act and was properly disposed of by Judge Rifkind in the court below.

The contention that the medical board did not allow a fair hearing because it gave undue weight to a medical report by a Swedish doctor who treated and observed the alien during her voyage to the United States is without substance. Such evidence, though hearsay, was properly incorporated in the record and considered by the medical board. The alien was given an opportunity to correct it by the examination conducted by the medical board and by [fol. 60] the testimony of her own expert medical witness before the appeal board in accordance with the provisions of

Section 16 of the statute. Moreover, the report of the Swedish doctor had confirmation in the alien's own admission that she had told him that she had hallucinations. She only explained this admission by saying "I say yes to everything and he took the pulse and I was hysteric." It was for the medical board to determine the weight to be given her explanation in the light of all the surrounding facts.

For the foregoing reasons, the order dismissing the writ of habeas corpus is affirmed.

CLARK, Circuit Judge (dissenting):

I agree with the propositions of law stated in the opinion, but am troubled by another matter not there discussed, namely, the stark and unadorned form of medical certificate, *i.e.*, that relator "has this day been examined and is found to be afflicted with—

MENTAL DEFECTIVE

Class 'A,'"

followed by the signatures of two surgeons. The Immigration Act of 1917, 8 U. S. C. A. §136(d), provides for the exclusion of person "who are found to be and are certified by the examining surgeon as being mentally or physically defective," thus in respondent's own words providing that "the examining surgeons were to do both the finding and the certifying." Nothing in the record tells us what a Class "A" Mental Defective is or how much the classification adds to the damning phrase. But search and the help of counsel show that the phrase goes back to the Regulations of the Surgeon General for the Medical Examination [fol. 61] of Aliens, the applicable provisions being those of September 15, 1947, as approved by the Federal Security Administrator pursuant to 8 U. S. C. A. §152, 42 id. §§249(c), 252, and set forth in 42 C. F. R., 1947 Supp., 34.1-34.13. These seem, at first blush at least, clear and admirable; they seem just as clearly not complied with here. Sec. 34.7 shows that there are three classes, with four types of diseases and defects in Class 'A,' including tuberculosis, a loathsome or dangerous contagious disease, a series of de-

fects, including idiocy, imbecility, chronic alcoholism, and four other types of like diseases, and finally a catchall group of mental defects not enumerated in the previous paragraph and not showing mental shortcomings due to ignorance, etc. This is a variegated list, among which the relator is left to guess as to her particular affliction. If we consider the certificate to refer to the last two paragraphs only, that still leaves some eight types of affliction.

But this vagueness seems directly contrary to the requirements of the regulations, which in §34.2(c) defines a certificate as a document issued by an examining medical officer to the Immigration Service, "signed by him and certifying his findings with respect to an alien's physical and mental condition." That real, and not formal, findings are meant is shown by the detailed provisions for re-examination by a specially convened board upon the alien's appeal, §34.13, leading to *findings and* conclusions on its part, viz.,

> "(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.
>
> "(h) The board shall report its findings and conclusions to the Immigration Service, and shall also [fol. 62] give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers."

Not only was the original certificate therefore defectively general, but there was no compliance with the provisions last quoted, and particularly the last sentence of (h). The statement of the Board of Medical Officers was merely that it had considered the appeal and, "after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate."

While I agree that the ideas of laymen should not control the views of medical experts upon this medical question, yet it does seem that under the statute the Board of Special Inquiry does have some function in the premises, namely, to see that there is an adequate and revealing certificate, just as the Surgeon General has required. Thus it

certainly should reject one which is self-contradictory, and the court must sustain the writ of habeas corpus if it does not, as was held in *Hughes* v. *U. S. ex rel. Licata*, 3 Cir., 295 F. 800, 802, affirming D. C. E. D. Pa., 289 F. 808. As Judge Learned Hand has said: "It is indeed another matter whether the certificate should not itself state the evidence upon which the conclusion is based, and what efforts have been made to ascertain the facts between entry and arrest. Certainly that is desirable." *U. S. ex rel. Povlowec* v. *Day*, 2 Cir., 33 F. 2d 267, 268, certiorari denied 280 U. S. 594. See also *U. S. ex rel. Papa* v. *Day*, D. C. S. D. N. Y., 45 F. 2d 435; and compare *U. S. ex rel. Devenuto* v. *Curran*, 2 Cir., 299 F. 206, 213. *U. S. ex rel. Fong On* v. *Day*, 2 Cir., 54 F. 2d 990, 991, 992, which finds no error in the admission in [fol. 63] evidence before a board of a certificate as to age based upon observation, where the relator had not availed himself of his privilege of calling the surgeon to testify, concerns so different a situation as to point the moral here. There was no question of according it conclusive effect. Even as evidence Judge Swan criticized it, saying, "Such a certificate is competent evidence, although it would carry more weight if it contained a statement of the nature of the surgeon's examination of the applicant and the grounds upon which he based his conclusion."

These general reactions of eminent judges are now given specific point by the Surgeon General's detailed regulations. Had the prescribed practice been followed here, we would not have been faced with this quite anomalous record where actual decision lurks behind the vaguest of medico-legal generalities and the precise and detailed evidence of the relator's expert does point to a result unjustifiably harsh. I would reverse the order and direct that the writ be sustained because of inadequacy of the original certificate of the examining surgeons and total failure of the reviewing Board of Medical Officers to comply with the regulations.

[fol. 64] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and forty-eight.

Present: Hon. Learned Hand, Chief Judge, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. MAY JOHNSON, Relator-Appellant,

v.

W. FRANK WATKINS, District Director, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 65] [Endorsed:] United States Court of Appeals, Second Circuit. United States ex rel. May Johnson v. W. Frank Watkins, etc. (67.) Judgment. United States Court of Appeals, Second Circuit. Filed November 29, 1948. Alexander M. Bell, Clerk.

[fol. 66] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 67] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1949.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.